SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1972

No. 71-1091

ALBERT ROBERT CASTELL, JR., PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES PORTER
Post Office Box 11588
Columbia, South Carolina
29211

OF COUNSEL:
TERRELL L. GLENN
REX L. CARTER

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The petitioner, Albert Robert Castell, Jr., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 1, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of South Carolina.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 1, 1972. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Can a criminal conviction under 18 U.S.C.A. § 659 be sustained where the indictment did not allege and the government did not prove that the property in question was stolen from any of the facilities of interstate commerce enumerated in the statute.

STATUTORY PROVISION INVOLVED

The statute under which the petitioner was indicted and convicted is 18 U.S.C.A. § 659, which provides in relevant part:

> **§ 659. Interstate or foreign shipments by carrier; State prosecutions**
>
> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

* * *

STATEMENT OF THE CASE

The defendant was indicted in the United States District Court for the District of South Carolina in a Three Count Indictment charging in Count I theft from an interstate shipment; in Count II possesion of goods knowing them to have been stolen while in interstate commerce; and in Count III with interstate transportation of stolen goods having a value exceeding Five Thousand ($5,000.00) Dollars. The defendant was reindicted on December 11, 1970, in a Three Count Indictment charging the same offenses but in which the language of the Indictment had been changed supposedly to conform to the provisions of Title 18, United States Code Annotated, Section 659. The Trial commenced three days later, on December 14, 1970, and resulted in the defendant's conviction on Count II. He was acquitted by the jury under Counts I and III. Following his conviction, he was sentenced on December 21, 1970, to the custody of the Attorney General for a period of eight (8) years under the provisions of Title 18, United States Code Annotated, Section 4208(a) (2).

The Indictment under which defendant was convicted charged in Count II:

"THE GRAND JURY FURTHER CHARGES:

"That on or about the 10th day of January 1970, in the District of South Carolina, at Greenville, South Carolina, ALBERT ROBERT CASTELL, JR. unlawfully, knowingly and wilfully did have in his possession chattels of a value in excess of $100.00, that is, 24,160 pounds of frozen beef which had been embezzled, stolen and unlawfully taken and carried away from Newark, New Jersey while moving in interstate commerce from Port Newark, New Jersey to Washington, D. C., and being the property of Standard Meat Company, Washington, D. C., the defendant then and there knowing the same to have been stolen, in violation of Title 18, United States Code, Section 659."

The defendant filed a motion for a bill of particulars in which he asked, among other things, "3. State from where the meat allegedly stolen was stolen." The government's answer was:

> "MR. SHEALY: All I can say is: While it was in transit; after it was unloaded from the ship, between there and Greenville, South Carolina." (T. 5.)

On the second day of trial, December 15, 1970, the government added the following information:

> (By MR. SHEALY:)
> "... I have more information now concerning the point of the theft that I did not have at that time, and I would like to so inform the Court and the attorneys for the defense that insofar as the place of the theft is concerned, in complying with the Bill of Particulars, we would allege that it was stolen from either a freezer, a shed or a forklift on the wharf in the Port of Newark, New Jersey." (T. 16.)

At that point in the trial, the defendant moved for a judgment of acquittal under Count II on the ground that "... it does not allege the place from which the theft occurred." (T. 16.) The Court took the motion under advisement. Later in the trial the Court refused the defendant's motion and declined to dismiss Count II of the Indictment.

Port Newark was described as a community covering several miles containing numerous buildings, lumber companies, a wine plant, a bank, as well as piers and warehouses.

No proof was offered at trial of where the goods were stolen except presumably the genral area of Port Newark, New Jersey.

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the circuits as to whether 18 U.S.C.A. § 659 requires that an indictment allege that the stolen property in question was taken from one of the places enumerated in the statute.

The Fourth Circuit decided this case on the basis of its decision in *United States v. Spivey,* 448 F. 2d 390 (4th Cir. 1971), Petition for Certiorari pending, Supreme Court Docket No. 71-5607. That case, as the present case, holds that the Indictment there in question was not defective for failure to specify the facilty from which the goods were stolen. The Fourth Circuit acknowledged that its view conflicted with *United States v. Manuszak,* 234 F. 2d 421 (3rd Cir. 1956) and *Wolkoff v. United States,* 84 F. 2d 17 (6th Cir. 1936).

The Fourth Circuit view is supported by decisions from two other circuits: *United States v. Wora,* 246 F. 2d 283 (2nd Cir. 1957); and *Dunson v. United States,* 404 F. 2d 447 (9th Cir. 1968), cert. den. 393 U. S. 1111 (1969). Thus, there is a clear conflict among the circuits that can be resolved only by this Court.

2. The decision below decides a significant and recurring problem.

The importance of the issue lies in defining whether the crime created by this statute covers all "goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express", or whether the crime is limited to those places enumerated in the statute. If the crime is not limited to those places listed in the statute, then much of the statute's language is superfluous, and when Congress amended the statute in 1966 to enumerate two additional facilities, *i.e.*, "pipeline system" and "storage facility", it did a useless act.

This Court had occasion to state the proposition recently when it observed in *United States v. Bass*, —— U. S. ——, 40 LW 4101, 4104 (1971):

> "In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States v. Universal C.I.T. Credit Corp.*, 334 U. S. 218, 221-222 (1952)."

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

CHARLES PORTER,
Post Office Box 11588
Columbia, South Carolina
29211.

February, 1972.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 71-1100

UNITED STATES OF AMERICA, APPELLEE,

versus

ALBERT ROBERT CASTELL, JR., APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA. CHARLES E. SIMONS, JR., DISTRICT JUDGE.

(Decided February 1, 1972.)

BEFORE SOBELOFF and BOREMAN, SENIOR CIRCUIT JUDGES and BRYAN, CIRCUIT JUDGE.

CARTER and PHILPOT and GLENN, PORTER & SULLIVAN ON BRIEF FOR APPELLANT, and JOHN K. GRISSO, UNITED STATES ATTORNEY, and RYAN C. SHEALY, ASSISTANT UNITED STATES ATTORNEY, ON BRIEF FOR APPELLEE.

Per Curiam:

Albert Robert Castell, Jr., appellant, claims that the indictment did not allege and that the Government failed to prove that the stolen property was taken from any of the places enumerated in 18 U.S.C. § 659. Upon the authority of *United States v. Spivey*, 448 F. 2d 390 (4 Cir. 1971), we find no merit in the claim that the indictment was fatally defective.

As to the claim of lack of proof, we find ample evidence in the record establishing appellant's removal of the stolen property from a wharf in Port Newark, New Jersey.

Accordingly we dispense with oral argument and affirm the conviction below.

Affirmed.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1091

ALBERT ROBERT CASTELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on one count of having possessed goods stolen from an interstate shipment, knowing the goods to have been stolen, in violation of 18 U.S.C. 659. He was sentenced to eight years' imprisonment subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam*, relying on its recent opinion in *United*

States v. *Spivey*, 448 F.2d 390, certiorari denied, February 22, 1972 (No. 71-5607).

Petitioner's sole contention is that the indictment was deficient in that it failed to allege the particular facility or place from which the goods were stolen. This information was disclosed to petitioner during the government's case in a bill of particulars (see Pet. 4). As we pointed out in our Memorandum in Opposition in *Spivey*, *supra*,[1] although a difference in circuits does exist on the question whether an indictment under Section 659 must specify the place or facility in interstate commerce from which the goods were stolen, we do not believe that the issue is of sufficient general importance to warrant review by this Court. We would note, moreover, that the more recent decisions have sustained indictments like the one in this case. *E.g.*, *Dunson* v. *United States*, 404 F.2d 447 (C.A. 9), certiorari denied, 393 U.S. 1111.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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[1] We are providing counsel with a copy of our *Spivey* memorandum.

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